Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-322

FREDERICK S. BAUM, ET AL.,
Petitioners,

—against—

LEFRAK FOREST HILLS CORP., LEFRAK KEW GARDENS CORP., AND FRANKLIN NATIONAL BANK,
Respondents.

MEMORANDUM OPPOSING CERTIORARI

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Respondent, Franklin National Bank, represents to the Court as follows:

1. The above entitled matters arose out of separate proceedings instituted by respondents, Lefrak Forest Hills Corp. and Lefrak Kew Gardens Corp., ("Lefrak") pursuant to Article 78 of the New York Civil Practice Law and Rules and by Franklin National Bank ("Franklin") pursuant to Section 668e-1.0 Administrative Code of the City of New York, to review and set aside resolutions of the Board of Standards and Appeals of the City of New York ("The Board") adopted on February 10, 1972, by which the Board denied applications by Lefrak and Franklin for a further extension of previously issued building

permits so as to allow the continued construction of two multiple dwelling buildings in the Forest Hills-Kew Gardens area of Queens County, New York.

By decision rendered December 26, 1972 and order entered thereon, the Appellate Division of the Supreme Court of the State of New York, Second Department, annulled and set aside the resolutions of the Board and directed the Board to issue an extension of the building permits "for one year beginning from the date of entry of (the) order (December 26, 1972)." (A 15)*.

The petitioners herein appealed to the Court of Appeals of the State of New York from the order of the Appellate Division of the Supreme Court of the State of New York, Second Department, and the Court of Appeals of the State of New York by judgment entered May 3, 1973 affirmed the order of the Appellate Division on the opinion of the Appellate Division. (A34-A37)

2. The petition for writ of certiorari was filed on August 17, 1973, more than ninety days since the entry of judgment by the Court of Appeals, and the period for applying for a writ of certiorari has not been extended by a Justice of this Court (U. S. C. Title 28, Sec. 2101 (c) and Rule 22 of this Court).

The petitioners contend that the period of ninety days within which to petition pursuant to 28 U. S. C. Sec. 2101 (c) was extended because Lefrak applied to the Appellate Division to amend its order of December 26, 1972 so as to require the Board to issue the one year extension of the building permits for one year from May 7, 1973 instead of for one year beginning December 26, 1972 and on May 25, 1973 the Appellate Division amended its order of December 26, 1972 by directing the Board to issue the building per-

*References are to Petitioners' Appendix.

mits "for a term of one year from May 7, 1973." The May 7, 1973 coincided with the date of filing of the remititur of the Court of Appeals (A49-A50). The order and judgment of the Court of Appeals was made the order and judgment of the Appellate Division of the Supreme Court on May 7, 1973. The motion to amend the order of the Appellate Division did not in any way affect the remititur of the Court of Appeals filed May 7, 1973. The motion to amend did not seek a reargument or a rehearing. The motion to amend the order of the Appellate Division was no more than a request that the Appellate Division reflect the passage of time from December 26, 1972 to May 7, 1973 so that the extension of the building permit would be for the one year period contemplated by that Court.

The petition for a writ of certiorari is addressed to the Judgment of the Court of Appeals. The running of the three-month period was not tolled by the application to the Appellate Division to amend its order so as to give effect to the expressed one year extension of the permits. On August 17, 1973 more than three months had elapsed since the finality of the judgment of the Court of Appeals as set by the filing of the remititur on May 7, 1973.

In *F. T. C.* v. *Minneapolis-Honeywell Regulator Co.*, 344 U. S. 206 (1952) this Court lay down the test to be applied to determine the timeliness of the filing of a petition for a writ of certiorari where a lower court judgment has been amended or modified. This Court Stated: (344 U. S. at 212)

> "The test is a practical one. The question is whether the lower court, in its second order, has disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality".

The amendment of May 25, 1973 by the Appellate Division did not disturb or revise legal rights and obligations which by the order of December 26, 1972 had been plainly and properly settled with finality. In fact, the amendment did no more than give effect to the prior direction for a one year extension of the permit.

Petitioners have failed to file their petition for a writ of certiorari within the prescribed time period. Accordingly the petition should be denied on the ground of untimeliness. *Department of Banking* v. *Pink*, 317 U. S. 264, 268 (1942). The failure to file the petition for a writ of certiorari within the ninety days as required by U. S. C. Title 28 Sec. 2101 (c) renders the petition jurisdictionally defective. *Department of Banking* v. *Pink, ibid.*

THEREFORE, it appears that petitioners' application for a writ of certiorari is out of time and should be denied.

Respectfully submitted,

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MURRAY RUDMAN
Attorney for Respondent
Franklin National Bank

Dated: September 10, 1973.